UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	Civil Action No. H-01-3624 (Consolidated)
This Document Relates To:	§	
MARK NEWBY, et al., individually and on behalf of all others similarly situated,	§	
Plaintiffs,	§	
vs.	§	
ENRON CORP., et al.,	§	
Defendants.	§	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., individually and on behalf of all others similarly situated,	§	
Plaintiffs,	§	
vs.	§	
KENNETH LAY, et al.,	§	
Defendants.	§	

MOTION OF DEFENDANT CANADIAN IMPERIAL BANK OF COMMERCE TO DISMISS THE CONSOLIDATED COMPLAINT AND MEMORANDUM OF LAW IN SUPPORT

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Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, defendant Canadian Imperial Bank of Commerce ("CIBC") hereby moves to dismiss the claims made against it in the *Newby* Consolidated Complaint for failure to state a claim upon which relief can be granted and failure to plead fraud with the particularity required by Rule 9(b) and the heightened pleading requirements imposed by the Private Securities Litigation Reform Act of 1995 (the "PSLRA").

INTRODUCTION

Desperate to find deep-pocket defendants, plaintiffs have amended their complaint to name as defendants (among others) all nine of Enron's major bank lenders. Plaintiffs allege that the bank defendants — who collectively loaned billions of dollars to Enron during the purported class period — somehow discovered in the course of their lending activities that Enron was nothing more than an "enormous Ponzi scheme," but nevertheless chose to continue investing hundreds of millions of dollars in order to keep that scheme alive. Based on this implausible assertion, plaintiffs seek to hold the bank defendants liable under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 for issuing favorable analysts' reports, for acting as underwriters on a variety of securities offerings, and for providing commercial and investment banking services to Enron — services that plaintiffs contend enabled Enron to mislead investors about its true financial condition.

Plaintiffs' massive complaint is packed with rhetorical flourishes (Enron was a "hall of mirrors inside a house of cards"), colorful quotations from the popular press, and conclusory accusations of complicity. Plaintiffs clearly hope that the sheer size of the complaint and the number of defendants, when coupled with the notoriety of the case, will discourage the Court from conducting the kind of defendant-by-defendant analysis of the *facts* alleged (as opposed to the conclusions asserted) that the PSLRA requires. See *Schiller v. Physicians Resource Group, Inc.*, 2002 WL 318441 at *5 (N.D. Tex. 2002) ("the PSLRA requires plaintiffs to 'distinguish among

those they sue and enlighten *each defendant* as to his or her particular part in the alleged fraud'"). But when the rhetoric and vague allegations of fraud are stripped away, it becomes clear that plaintiffs have no factual basis for accusing CIBC (among others) of engaging in securities fraud. Accordingly, plaintiffs' claims against CIBC must be dismissed for failure to state a claim and failure to meet the heightened pleading requirements of the PSLRA.

Much of the complaint against the banks in general and CIBC in particular is based on a theory that the Supreme Court rejected eight years ago in 1994 in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) — namely, that a bank can be held liable under Section 10(b) for knowingly providing substantial assistance to an issuer who commits securities fraud. In *Central Bank*, the Supreme Court concluded that liability for aiding and abetting a violation of Rule 10b-5 cannot be squared with the plain language of § 10(b). The Court held that § 10(b) "prohibits only the *making* of a material misstatement (or omission) or the commission of a manipulative act" and that the "proscription does *not* include giving aid to a person who commits a manipulative or deceptive act." 511 U.S. at 177 (emphasis added). Under *Central Bank,* it is not enough for a plaintiff to allege that a defendant somehow enabled someone *else* to make a material misstatement; plaintiffs must be able to plead and prove that the defendant itself made a materially false or misleading statement on which investors relied in purchasing securities.

Plaintiffs' allegations that CIBC "participated" in Enron's alleged fraudulent "scheme" by structuring and/or financing investment partnerships and so-called special purpose entities ("SPEs") and by lending money to Enron and Enron-related entities (Complt. ¶ 70(c)) are nothing more than claims of aiding and abetting by another name; as such, they fail as a matter of law under *Central Bank*. CIBC cannot be held liable under Section 10(b) for assisting Enron in the creation or financing of investment vehicles which, in turn, enabled Enron to make misleading statements to

investors about its financial condition. Instead, plaintiffs can only state a claim if they can point to statements made by CIBC on which investors relied and allege specific facts that give rise to a strong inference that CIBC either knew those statements were materially misleading or was severely reckless in ignoring facts that made their falsity obvious.

Plaintiffs have tried to anticipate a *Central Bank* challenge by alleging that CIBC spoke to the market through research reports issued throughout the purported class period by analysts employed by a CIBC subsidiary (CIBC World Markets Corp.). But there are a variety of reasons why the analysts' reports cannot provide a basis for holding CIBC liable for securities fraud. Plaintiffs have not met their basic obligation under the PSLRA of identifying which statements in those reports were allegedly false or misleading and of explaining why they were allegedly false or misleading when made. Nor have they offered any explanation as to how or why statements made by analysts employed by one of the Bank's subsidiaries can give rise to liability under Section 10(b) on the part of the Bank. Most importantly, plaintiffs have not come close to meeting their burden under the PSLRA of alleging particularized facts that give rise to a "strong inference" that either the analysts or anyone else at CIBC knew or recklessly disregarded evidence from which it must have been obvious that Enron was the "house of cards" plaintiffs say it was.

Plaintiffs claim that some unidentified person or persons somewhere within the CIBC corporate family must have known the "truth" about Enron. But their boilerplate assertion (repeated with respect to all nine bank defendants) that CIBC must have known the truth because its position as a major lender to Enron gave it access to material inside information is precisely the "type of generalized allegation[] routinely rejected as failing to raise a strong inference of scienter." *In re Baker Hughes Sec. Litig.*, 136 F.Supp.2d 630, 648 (S.D. Tex. 2001). Moreover, plaintiffs' theory makes no sense: why would Enron — which plaintiffs allege was cooking its books in a variety of

ways to mislead investors about its financial condition — imperil desperately-needed financing from its bank lenders by allowing them access to information that would reveal the truth? And if the banks did somehow discover the truth, why would they agree to put billions of dollars at risk in the hope that no one else would learn the truth?

The same analysis applies to plaintiffs' claims that CIBC invested in and financed SPEs and partnerships knowing that they had been created to fabricate phony income for Enron by buying assets from Enron at wildly inflated prices. Plaintiffs do not allege any facts from which the Court could infer that CIBC realized that any of the transactions cited in the complaint were improper. Nor does that theory make any sense. Plaintiffs allege that CIBC put more than $100 million into these investments, knowing that they were doomed to fail, because it had been assured that Enron would pay it back. At the same time, however, plaintiffs allege that CIBC knew that Enron was in such a "fragile financial condition" that Enron could not possibly make good on those alleged guarantees. Complt.¶ 41. Plaintiffs cannot have it both ways. If CIBC was investing and lending large sums of money on the strength of Enron's assurances, the only reasonable inference that can be drawn from that fact is that CIBC believed that Enron was the fundamentally sound and prosperous company it purported to be. Plaintiffs have not pointed to any facts that would give rise to an inference — let alone the required strong inference — that CIBC was a knowing participant in, rather than simply another victim of, Enron's alleged fraud.

Finally, plaintiffs purport to bring both a Section 11 and Section 10(b) claim against CIBC based on the fact that CIBC World Markets Corp. was an underwriter of a May 1999 offering of $500 million in Enron notes. Because CIBC (which is the only CIBC-related entity plaintiffs have sued) was not the underwriter of that note issue, the Registration Statement issued in connection with the note offering cannot provide a basis for holding CIBC liable under either Section 11 or Section

10(b). Moreover, even if plaintiffs had sued the proper entity, they would have failed to state a claim under either Section 11 or Section 10(b) because they have not even attempted to identify any specific statement in that Registration Statement that was allegedly false or misleading and have not backed up their allegations of scienter with the kind of specific factual allegations required by the PSLRA and Rule 9(b).

BACKGROUND[1/]

Plaintiffs purport to bring their complaint on behalf of all purchasers of Enron common stock and other securities during the period between October 19, 1998 (three years before the initial complaint was originally filed) and November 27, 2001 (shortly before Enron declared bankruptcy). Complt. ¶ 1. The only CIBC entity plaintiffs have named as a defendant is the parent company, Canadian Imperial Bank of Commerce. In ¶ 103 of the complaint, however, plaintiffs define the term "CIBC" to include both the Bank itself and its "controlled subsidiaries and divisions (such as CIBC Oppenheimer or CIBC World Markets)." As a result, it is impossible to tell when plaintiffs allege that "CIBC" took a particular action or made a particular statement precisely *which* CIBC-

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[1/] For purposes of this motion to dismiss, the Court is, of course, required to assume the truth of the well-pleaded allegations of the complaint. However, the Court can and should disregard "conclusory allegations" and "unwarranted deductions of fact," *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir.1994), as well as allegations that lump all of the defendants together, without identifying what each defendant did or said or supposedly knew. See *In re BMC Software, Inc. Sec. Litig.*, 183 F.Supp.2d 860, 902 n.45 (S.D. Tex. 2001) (expressing agreement "with those district courts that find that the group pleading doctrine is at odds with the PSLRA and has not survived the amendments"); *accord, Branca v. Paymentech, Inc.*, 2000 WL 145083 at *7-8 (N.D. Tex. 2000) (attributing statements to the "defendant" without identifying the speaker is a pleading technique that is barred by the PSLRA); *Coates v. Heartland Wireless Communications*, 26 F.Supp.2d 910, 916 (N.D. Tex. 1998) ("the PSLRA codifie[d] a ban against group pleading"). In this case, large portions of the complaint consist of vague allegations that "defendants" or the "banks" did certain things or knew certain information, without any identification of *which* banks supposedly did what or knew what information. See, *e.g.*, Complt. ¶¶ 11, 14, 19, 21, 23-25, 31-34, 48, 53, 57, 70(c), 271, 301, 305, 313-14, 324, 350-51, 360, 433, 617-21, 628-30, 628-30, 651, 994-97. In ruling on CIBC's motion to dismiss, the Court should disregard all of these allegations and consider only the allegations of the complaint that specifically refer to CIBC.

related entity plaintiffs are referring to.

Plaintiffs allege that "CIBC" (presumably meaning the Bank itself) had a long-standing lending relationship with Enron and that it was "one of the principal commercial lending banks to Enron" during the purported class period. Complt. ¶ 718. From November 1997 through August 2001, plaintiffs allege that CIBC made or participated in two $250 million loans to Enron or an Enron subsidiary (which Enron guaranteed) and participated in a $1 billion and then a $3 billion committed credit facility to back up Enron's commercial paper. Complt. ¶ 719.

Most of the complaint has nothing to do with CIBC or the other bank defendants. Hundreds of paragraphs are devoted to accounting issues and alleged misstatements in which CIBC is not alleged to have had any involvement whatsoever. By contrast with the sprawling nature of the claims made against the Enron-related defendants and Arthur Andersen, plaintiffs' claims against CIBC are relatively limited, involving only three categories of activities: (i) issuing analysts' reports, (ii) acting as an underwriter for a single issue of Enron notes in May 1999, and (iii) investing in or providing financing in connection with three projects that plaintiffs contend Enron used to misstate its financial statements. As demonstrated below, none of these allegations state a claim against CIBC.

The Analysts' Reports

Plaintiffs rely heavily on their claim that "CIBC" issued periodic analysts' reports throughout the purported class period that supposedly contained false and misleading statements. The thirteen reports plaintiffs cite, copies of which are attached hereto as Ex. A, show that they were issued by CIBC World Markets Corp., which is identified in the reports as a wholly-owned subsidiary of

Canadian Imperial Bank of Commerce.[2/] In those reports, CIBC typically repeated information that had been publicly disclosed by Enron and then provided a recommendation to investors (a "buy" recommendation throughout most of the class period), along with a prediction as to Enron's future earnings and stock price. See Complt. ¶¶ 148, 161, 176, 183, 194, 199, 207, 230, 251, 323, 349, 334, 372.[3/] The analysts never purported to have verified the accuracy of the information Enron had provided to the market. In fact, each report carried a legend expressly disclaiming any responsibility for the accuracy of the information set forth in the report, stating that "[t]he information and any statistical data contained herein have been obtained from sources which we believe to be reliable, but *we do not represent that they are accurate or complete, and they should not be relied upon as such.*" See Ex. A hereto (page 2 of each report). In addition, each report warned investors that CIBC-related entities might have relationships with Enron that could be viewed as creating a conflict of interest with potential investors:

> A CIBC World Markets company or its shareholders, directors, officers and/or employees, may have a long or short position or deal as principal in the securities discussed herein, related securities or in options, futures or other derivatives instruments based thereon. A CIBC Company may have acted as initial purchaser or placement agent for a private placement of any of the securities of any company mentioned in this report, may from time to time solicit from or perform financial advisory, investment banking or other services for such company, or have lending or other credit relationships with the same.

[2/] In ruling on a motion to dismiss, "[t]he Court may . . . consider documents 'integral to and explicitly relied on in the complaint,' that the defendant appends to his motion to dismiss, as well as the full text of documents that are partially quoted in or referred to in the complaint." *BMC Software Litig.*, 183 F.Supp.2d at 882.

[3/] In ¶¶ 113, 120 and 132, plaintiffs also cite analysts' reports allegedly issued by CIBC on July 15, 1998, October 14, 1998, and January 25, 1999. These reports were all issued more than three years before CIBC was added as a defendant and therefore any claims based on these reports are barred by the three-year statute of repose applicable to Section 10(b) claims. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991) (Section 10(b) claims must be brought within three years of the alleged violation).

Id.

Plaintiffs allege that the CIBC analysts' reports identified in the complaint — as well as other, unidentified CIBC analysts' reports — contained false and misleading statements "concerning Enron's business, financial condition and its future profits." Complt. ¶ 724. But nowhere in the complaint do plaintiffs identify precisely which of the statements are alleged to have been false, let alone try to explain why they were false at the time they were made. Instead, plaintiffs offer the Court 140 pages' worth of statements made by various parties during the purported class period (Complt. at 110-254), punctuated at intervals by allegations that "[e]ach of the statements made between" certain dates was "false and misleading," followed by a lengthy recitation of what the "true" facts supposedly were. See, *e.g.*, Complt. ¶ 155.

Plaintiffs' scienter allegations are no more specific. Plaintiffs do not claim that any of the analysts whose names appear at the top of the analysts' reports actually knew that the information Enron had provided to investors was untrue or did not honestly believe in the opinions and recommendations they were making to their clients. Instead, plaintiffs allege that some unidentified person or persons at "CIBC" knew that "Enron was falsifying its publicly reported financial results and that its true financial condition was much more precarious than was publicly known" (Complt. ¶ 733) and then argue that this alleged knowledge should be attributed to the analysts.

In support of their claim that someone at "CIBC" knew that "the apparent success of Enron was a grand illusion" (Complt. ¶ 17), plaintiffs allege that CIBC "obtained this knowledge due to its access to Enron's internal business and financial information as one of Enron's lead lending banks, as well as its intimate interaction with Enron's top officials which occurred virtually on a daily basis." Complt. ¶ 733. Plaintiffs repeat the very same allegation, verbatim, with respect to all of the other defendant banks as well, without ever identifying what "internal business and financial

information" *any* of the banks supposedly obtained, let alone explaining why that information supposedly alerted them to the fact that Enron was falsifying its publicly reported financial results. Compare Complt. ¶¶ 670, 689, 713, 748, 760, 771, 784 and 798.

Plaintiffs' allegations in support of their argument that "CIBC's" knowledge should be attributed to the analysts are equally vague. Plaintiffs acknowledge that the analysts who followed Enron were supposed to be screened off by so-called "Chinese walls" from any material inside information CIBC might obtain when providing commercial or investment banking services to Enron. Complt. ¶ 717.[4/] Nevertheless, plaintiffs allege that "[i]n interacting with Enron, CIBC functioned as a consolidated and unified entity" and that "[t]here was no 'Chinese Wall' to seal off CIBC securities analysts from information which the commercial and investment banking parts of CIBC obtained in the course of rendering their commercial and investment banking services to Enron." Complt. ¶ 717. Plaintiffs then go on to allege in the alternative that "even if some restrictions were placed on the information made available to CIBC's securities analysts, that unilateral and self-serving action is insufficient to prevent the imputation of all knowledge (and scienter) possessed by the CIBC legal entity, as its knowledge and liability in this case is determined by looking at CIBC as an overall legal entity." *Id.* Plaintiff make the very same allegations, word for word, with respect to all of the bank defendants who are alleged to have issued analysts' reports. Complt. ¶¶ 654, 676, 695, 737, 764, 775, 789.

Significantly, nowhere in their complaint do plaintiffs provide any factual basis whatsoever for their assertion that CIBC did not have effective barriers in place to ensure that confidential, inside

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[4/] Broker-dealers are required by statute to erect barriers to ensure that their research analysts will not have access to whatever material inside information the broker-dealer or "any person associated with the broker-dealer" may obtain in the course of providing commercial banking, underwriting or other services to issuers. See Section 15(f) of the 1934 Act, 15 U.S.C. § 78o(f).

information obtained in the course of lending or investment banking activities was not passed on to analysts. Nor do they offer any facts in support of their alternative claim that, even if there was an effective Chinese wall at CIBC, it should somehow be ignored so that the knowledge of anyone, anywhere in the CIBC corporate family can or should be imputed to the analysts.

The May 1999 Note Offering

Plaintiffs allege that "CIBC" acted as an underwriter for Enron, listing six different offerings in which it allegedly served in that capacity. Complt. ¶ 718. However, five of those six offerings were completed more than three years before the complaint was amended on April 8, 2002 to name CIBC as a defendant. As a result, any claims arising out of those offerings are barred by the three-year statute of repose applicable to securities fraud claims. See 15 U.S.C. § 77m (claims under Section 11 may not be brought more than three years after the security was offered to the public); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991) (applying three-year statute of repose to Section 10(b) claims). The last offering — a $500 million offering of 7.375% Enron notes in May 1999 — is the only one as to which plaintiffs could conceivably bring any claim. Complt. ¶ 723. That offering is the sole basis for plaintiffs' Section 11 claim against CIBC.

The Prospectus and Registration Statement for the notes issued in May 1999, attached hereto as Ex. B, shows that "CIBC World Markets Corp." was one of three underwriters for this offering.[5/] In ¶ 723 of their complaint, plaintiffs allege that these documents contained "statements made by CIBC as an underwriter" which were supposedly false. But nowhere in their 500-page complaint do plaintiffs quote any particular statements from this Prospectus/Registration Statement, let alone

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[5/] It is well settled that, in ruling on a motion to dismiss, the Court can take judicial notice of documents like the Prospectus, which was filed with the SEC and is cited and relied upon by plaintiffs in their complaint. See *BMC Software Litig.*, 183 F.Supp.2d at 881-82.

identify with any specificity how or why such statements were allegedly false or misleading at the time they were made.

Plaintiffs' Allegations With Respect To CIBC's Claimed Participation In Enron's Fraudulent Scheme

Finally, plaintiffs allege that CIBC participated in a fraudulent scheme to misrepresent Enron's financial condition, by helping Enron to create and/or investing in or providing financing to three off-balance sheet entities — the LJM2 partnership, the so-called "Project Braveheart" entity, and Hawaii 125-0. Plaintiffs apparently seek to use these allegations for two purposes: as acts supposedly giving rise to primary liability under Section 10(b) — a claim that, as demonstrated in Part II below, is precluded by *Central Bank* — and as evidence that CIBC knew that Enron was misleading investors with respect to its true financial condition.

The LJM2 Partnership

Plaintiffs allege that at year-end 1999 unidentified "top executives" of CIBC invested $15 million in equity money in LJM2 as a "reward" for CIBC's alleged "participation in the scheme." Complt. ¶ 732. Plaintiffs contend that LJM2, a partnership organized by Enron CFO Andrew Fastow, was one of the "primary vehicles" that Enron used "to falsify Enron's financial condition and results during the Class Period." Complt. ¶ 646. Among other things, plaintiffs allege that Enron generated year-end profits by selling a number of virtually worthless assets to LJM2 for hundreds of millions of dollars and then, soon after the new year, repurchasing those assets at a premium, creating large profits for the LJM2 partners. Complt. ¶ 32.

Significantly, plaintiffs do *not* allege that CIBC was aware of the details of the various transactions that LJM2 entered into or that it knew that the assets being "sold" were worth far less than the prices being put on them by Fastow and Enron. Nor could they make such a claim. The

private placement memorandum ("PPM") for the LJM2 partnership interests, discussed below and attached hereto as Ex. C, makes it clear that the limited partners' investment would be entirely passive and that the limited partners "will be relying entirely on the General Partner [controlled by Fastow] and the Manager to conduct and manage the affairs of the Partnership . . . and must rely on the ability of the General Partner to make appropriate Investments for the Partnership and to dispose of such Investments and of the Manager to manage such Investments." Ex. C at 30.

Unable to allege facts indicating knowledge of specific transactions, plaintiffs instead contend that the Court can infer that CIBC and the other banks knew that a scheme to defraud was afoot from the PPM that Merrill Lynch prepared for LJM2. Plaintiffs quote portions of the PPM suggesting that the partnership was likely to do extremely well because it would "hav[e] the opportunity to invest in Enron-generated investment opportunities that would not be available to outside investors." Complt. ¶ 646. They then characterize the PPM as an "invitation to join in the benefits of [Fastow's] self-dealing transactions with Enron." *Id.*

The full text of the PPM, however, conveys a very different impression. First, nothing in the PPM even remotely suggests that the limited partners were being promised windfall profits in return for their participation in a venture that was designed to generate phony earnings for Enron. On the contrary, the PPM explains that the partnership was likely to be very profitable because Enron itself had been so successful in the past in selecting investment opportunities and the partnership would be able to piggyback on Enron's "significant proprietary deal flow" and "rigorous process of investment analysis" to choose the very best investments. Ex. C at 2. As evidence of "Enron's record as a successful investor," the PPM pointed to the appreciation of Enron's own common stock, which had increased 641% from January 1, 1990 through September 30, 1999. *Id.*

Second, the PPM does not suggest that the Partnership expected to benefit from any

impermissible self-dealing by Fastow. On the contrary, the PPM explains that sharing investment opportunities with LJM2 was in Enron's best interests because by selling all or part of a promising project to co-investors it would "optimize its financial flexibility" — realizing immediate cash from a venture that might take several years to start generating significant cash flow or earnings and thus obtaining additional capital to finance substantial growth and make additional investments. Ex. C at 2. Furthermore, investors were promised that steps had been taken, both within the Partnership and at Enron, to "assure that the conflict-of-interest issue is fully vetted" so that investments were made in a manner consistent with Fastow's duties both to the Partnership and to Enron. Ex. C hereto at 12.

The PPM does not support an inference that CIBC and the other LJM2 investors knew either that Enron was a house of cards about to fall or that the Partnership would be used to generate phony earnings for Enron. On the contrary, the only reasonable inference that can be drawn from the decision to invest in response to the PPM is that the limited partners believed Enron was exactly what it purported to be — a savvy investor with a Midas touch, which aggressively used investment vehicles like LJM2 to accelerate its ability to continue growing.

The only other allegation plaintiffs make with respect to the alleged participation by CIBC executives in LJM2 is that all of the limited partners made their contributions early in order to enable LJM2 to enter into year-end transactions. Plaintiffs breathlessly report this fact as if it were somehow proof, in and of itself, of guilty knowledge on the part of the investors. See, *e.g.*, Complt. ¶ 647 ("in an extraordinary step, Enron's banks and bankers [including CIBC], knowing that LJM2 was going to be an extraordinarily lucrative investment, ***put up their money early***") (emphasis in original). But the PPM suggests that the investors thought LJM2 would be "an extraordinarily lucrative investment" *not* because it was going to be the vehicle for any wrongdoing, but rather

because, based on Enron's past track record, the investments LJM2 would be offered would be highly successful ventures. Under these circumstances, the fact that the investors put up their money early suggests only that they too were persuaded by the picture of great success Enron had painted — and *not* that the investors realized that the picture was false.

Project Braveheart

The second transaction plaintiffs cite as evidence of CIBC's participation in the alleged scheme was the so-called "Braveheart" deal at year-end 2000. The "Braveheart" project was a joint venture with Blockbuster Video that was designed to use the broadband capacity that Enron controlled to bring movies directly to a consumer's television — without having to make a trip to the video rental store. Plaintiffs allege that the project was doomed to failure from the start because Enron did not have the technical capacity to make it work and Blockbuster never obtained the legal right to offer movies through broadband. Complt. ¶ 300(o). Nevertheless, they claim that, at the end of 2000, CIBC and Enron formed a partnership to purchase Project Braveheart and that CIBC agreed to invest $115 million in the partnership in return for a "large up-front fee and the right to receive 93% of Enron's profits" from the joint venture over the next 20 years. Complt. ¶ 727. As a result of the sale of its interest in the joint venture, Enron recognized $110 million in profits in the fourth quarter of 2000 and the first quarter of 2001. *Id.*

Plaintiffs allege that, despite investing $115 million in the project, CIBC knew all along that the joint venture with Blockbuster was "very risky" and "was plagued by technical and legal problems that made it likely that it would never advance past a pilot project stage." Complt. ¶ 727. Plaintiffs contend that CIBC entered into the deal for the purpose of helping Enron manufacture phony profits — and not because it believed that the investment was a good one. In support of that accusation, plaintiffs do not cite any facts suggesting that CIBC was aware of the alleged problems

with the project. Instead, the sole basis for plaintiffs' allegation is its claim that "Enron had secretly guaranteed CIBC's investment in Braveheart so that CIBC was not a true investor and was not at risk." Complt. ¶ 728. That allegation, in turn, is based entirely on a *Wall Street Journal* article quoted at length in ¶ 729 of the complaint, where three unidentified "former Enron employees familiar with the partnership deals" are quoted as having said that Enron made the partnership "more attractive by promising to repay CIBC the full value of its investment if the partnership failed to be a money maker."

In ¶ 728 of the complaint, however, plaintiffs admit that when the joint venture was abandoned in March 2001, just three months after CIBC made its investment, Enron did *not* reimburse CIBC for its lost investment. Plaintiffs speculate that CIBC did not press Enron for payment on the alleged guarantee because "CIBC knew Enron's financial condition was such that it could not honor its secret guarantee" and that CIBC supposedly agreed to carry the $115 million investment "until later" so the Ponzi scheme could continue. *Id.*

The convoluted story plaintiffs tell, however, makes no sense. The most plausible explanation for Enron's failure to make CIBC whole after the joint venture failed is that there was no "secret guarantee" in the first place and that CIBC made its investment believing that Enron Chairman Kenneth Lay had been right in calling the marriage of broadband and movies a "killer app for the entertainment industry." Complt. ¶ 729. The inference that CIBC was itself a victim misled by Enron's enthusiastic statements about the Braveheart Project is certainly far more reasonable than the claim that CIBC invested $115 million *knowing* that the venture would likely fail, in reliance on a "secret guarantee" that it supposedly *knew* Enron would not be able to fulfill because of its "fragile financial condition." Complt. ¶ 41.

Hawaii 125-0

The third transaction in which CIBC allegedly participated was the New Power IPO, in which a CIBC entity acted as an underwriter. Plaintiffs allege that after the IPO was completed in the fourth quarter of 2000, Enron and CIBC created an entity called "Hawaii 125-0" and that CIBC, together with Enron's other banks, made a loan of $125 million that was allegedly used to enable Hawaii 125-0 to purchase New Power warrants from Enron. Complt. ¶ 731. They allege that Hawaii 125-0 then went on to engage in what plaintiffs characterize as a phony hedge transaction with respect to the warrants with another Enron-created and controlled entity called "Porcupine." *Id.* Plaintiffs do *not* allege any facts to suggest that CIBC had any involvement in or knowledge of the phony hedge transaction that Hawaii 125-0 engaged in after the bank loan was made. Instead, their only allegation is that CIBC and the other banks received from Enron what plaintiffs characterize as a "secret" "total return swap" guarantee on the $125 million loan, which protected the banks from any loss. *Id.*

Nowhere in their 500-page complaint, however, do plaintiffs cite any factual basis for believing that the existence of the total return swap guarantee was in fact concealed nor do they explain why the existence of such a guarantee would give rise to an inference that CIBC or the other banks were aware either that the subsequent hedge transaction was phony or that Enron was in reality in dire financial straits. Once again, to the extent plaintiffs are claiming that CIBC and the other banks were relying on Enron to make them whole if any losses resulted from these loans, those allegations support the conclusion that the banks believed that Enron was fundamentally sound — and did *not* know that it was, as plaintiffs now contend, a giant Ponzi scheme in imminent danger of failing.

ARGUMENT

I. The PSLRA Requires Claims To Be Dismissed If Plaintiffs Cannot Meet The Heightened Pleading Requirements Of The PSLRA.

Under the Supreme Court's decision in *Central Bank*, a defendant cannot be held liable under Section 10(b) as an aider and abettor; instead, the plaintiff must plead and prove that each defendant meets the requirements for primary liability under 10(b). See *Central Bank*, 511 U.S. at 191; *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1204 (11th Cir. 2001); *Wright v. Ernst & Young LLP*, 152 F.3d 169, 174 (2d Cir.1998); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1224-25 (10th Cir. 1996); *Melder v. Morris*, 27 F.3d 1097, 1104 n.9 (5th Cir. 1994). Thus, in order to state a claim under Section 10(b), a plaintiff must allege, with respect to each and every defendant "in connection with the purchase or sale of securities, '(1) a misstatement or an omission (2) of material fact (3) made with scienter (4) on which plaintiff relied (5) that proximately caused [the plaintiff's] injury.'" *Nathenson v. Zonagen Inc.*, 267 F.3d 400, 406-07 (5th Cir. 2001).

The PSLRA imposed heightened pleading requirements on plaintiffs bringing Section 10(b) claims; the Act provides that the district court "shall" dismiss the complaint if plaintiffs fail to comply with any of those requirements. See 15 U.S.C. § 78u-4(b)(3)(A); *Nathenson*, 267 F.3d at 407, 412-13. Among other things, the PSLRA requires plaintiffs to identify each allegedly false or misleading statement and "specify" as to each one "the reason or reasons why" it was allegedly false or misleading when made. 15 U.S.C. § 78u-4b(1). If any such allegations are made on information and belief, plaintiffs must disclose "all facts on which that belief is formed." *Id.*

Conclusory allegations of scienter are not enough to state a claim under the PSLRA. Instead, plaintiffs must "state with particularity facts giving rise to a strong inference" that each particular defendant made misleading statements with an intent to deceive. 15 U.S.C. § 78u-4(b)(2). The

PSLRA imposes particularly stringent pleading and proof requirements where the allegedly misleading statements are "forward-looking." To state a claim based on predictions or other forward-looking statements, plaintiffs must plead specific facts giving rise to a "strong inference" that the speaker made the prediction with "actual knowledge" that it could not come true. 15 U.S.C. § 78u-5(c)(1)(B). For all other types of statements, plaintiffs must plead facts giving rise to a strong inference that the defendant's statements were made with "severe recklessness" — a state of mind that "resembles a lesser species of intentional misconduct" and is "limited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it." *Nathenson*, 267 F.3d at 408.

In *Nathenson*, the Fifth Circuit made it clear that it is not enough to allege that the defendants had a plausible *motive* to deceive investors. While allegations of motive may contribute to an inference of severe recklessness in appropriate cases, they are not enough, standing alone, to meet the plaintiffs' burden of pleading "particularized facts giving rise to a strong inference of scienter." 267 F.3d at 412. See also *Zishka v. American Pad & Paper Co.*, 2001 WL 1645500 at *2 (N.D. Tex. 2001) ("The *Nathenson* court found . . . that the passage of the PSLRA rendered motive and opportunity pleading alone insufficient for purposes of alleging scienter").

This extraordinary case warrants particular care to make sure that plaintiffs have a sound factual basis for alleging that each defendant engaged in securities fraud. In light of the intense publicity surrounding this case and the tens of billions of dollars of damages claimed by the plaintiffs, the risk that a defendant will be coerced into settling without regard to the merits of the claims made against it is extremely high. The PSLRA was designed to protect defendants from

precisely this kind of undue pressure, by requiring plaintiffs, *before* proceeding with discovery, to demonstrate a real factual basis for believing that each defendant acted with an intent to defraud investors. For all of the reasons outlined below, plaintiffs have failed to make such a showing with respect to CIBC.

II. Plaintiffs' Allegations That CIBC Participated In A "Scheme" To Defraud Investors Fail To State A Claim Under *Central Bank*.

As described above, plaintiffs allege that CIBC and the other banks participated in Enron's alleged scheme to defraud investors by lending money to Enron and by helping Enron create and finance some of the SPEs and partnerships that Enron allegedly used to fabricate phony earnings and hide debt. After *Central Bank*, however, allegations of participation in a scheme to violate the securities laws are clearly not enough to state a claim under Section 10(b). Instead, plaintiffs must allege sufficient facts to show that "*all* of the requirements for primary liability under Rule 10b-5 are met" with respect to each and every defendant. 511 U.S. at 191.

In *Central Bank*, the Supreme Court stated that "any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5." 511 U.S. at 191. Plaintiffs try to fit within this test by claiming that Enron's SPEs were "manipulative devices" and that the banks' alleged participation in the formation or financing of those entities could therefore be deemed a primary violation of Rule 10b-5. The term "manipulation," however, is "virtually a term of art when used in connection with securities markets." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976). "The term refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476 (1977).

Because the concept of "manipulation" is so narrowly defined, "'manipulation' is not a magic word whose use in a complaint automatically defeats a motion to dismiss." *Pin v. Texaco, Inc.*, 793 F.2d 1448, 1452 (5th Cir. 1986); *accord Anixter*, 77 F.3d at 1225 n.9 (the concept of "manipulation" had no application where the defendant was an auditor charged with assisting the company in issuing false financial statements). In this case, plaintiffs have not stated a claim for manipulation against CIBC because they have not alleged that CIBC engaged in any kind of trading activity in Enron securities that artificially affected the market for those securities. Instead, their claim is based entirely on the alleged deception of investors by public statements issued by Enron.

Under these circumstances, in order to state a claim against CIBC under *Central Bank*, plaintiffs would have to plead and prove that CIBC itself made a material misstatement or omission on which investors relied. As the Second Circuit explained in *Wright v. Ernst & Young LLP*, allegations that the defendant somehow enabled another party to make a deceptive statement on which investors relied are not enough to state a claim of primary liability: "'if *Central Bank* is to have any real meaning, a defendant must actually make a false or misleading statement in order to be held liable under Section 10(b). Anything short of such conduct is merely aiding and abetting, and no matter how substantial that aid may be, it is not enough to trigger liability under Section 10(b).'" 152 F.3d at 175. The Tenth Circuit in *Anixter* and the Eleventh Circuit in *Ziemba* both reached the same result. In *Anixter*, the Tenth Circuit explained that "[t]he critical element separating primary from aiding and abetting violations is the existence of a representation, either by statement or omission, made by the defendant, that is relied upon by the plaintiff." 77 F.3d at 1225. Following the Second Circuit's lead, the Eleventh Circuit in *Ziemba* held that "in light of *Central Bank*, in order for the defendant to be primarily liable under § 10(b) and Rule 10b-5, the alleged misstatement or omission upon which a plaintiff relied must have been publicly attributable to the

defendant at the time that the plaintiff's investment decision was made." 256 F.3d at 1205.[6/]

Under *Wright*, *Anixter* and *Ziemba*, allegations of "participation" in a scheme to defraud investors are not enough to state a claim for primary liability under Section 10(b) unless the defendant's alleged participation consisted of making a false and misleading statement on which investors allegedly relied. Thus, for example, the court in *In re JDN Realty Corp. Secs. Litig.*, 182 F.Supp.2d 1230, 1247 (N.D. Ga. 2002), concluded that the preparation by an attorney of false settlement statements and closing binders for a real estate transaction, which enabled the issuer to create misleading financial statements that were disseminated to investors, was not sufficient to give rise to primary liability on the part of the attorney. The court held that, in the absence of any statements to investors that were publicly attributed to the attorney, any claims against him were merely claims for aiding and abetting and therefore inadequate as a matter of law. *Accord*, *In re HI/FN, Inc. Secs. Litig.*, 2000 U.S. Dist. LEXIS 11631 at *35 (N.D.Cal. 2000) ("plaintiffs' allegations of a scheme to defraud by individual defendants who are not alleged to have made statements do not support a claim for violation of § 10(b)"); *In re Kendall Square Research Corp. Securities Litig.*, 868 F.Supp. 26, 28 n.1 (D. Mass. 1994) (allegations that accountant participated in the "structuring" of certain transactions that were then improperly reported in the company's financial statements did not suffice to state a claim under *Central Bank* absent a public statement by the accountant).

So too, in this case, plaintiffs' allegations that CIBC participated in creating certain entities and entered into transactions that supposedly enabled Enron to create misleading financial statements

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[6/] The Ninth Circuit is in a minority position in suggesting that a secondary actor who plays a significant role in the drafting and editing of allegedly false or misleading statements may be held primarily liable under Section 10(b). See *In re Software Toolworks, Inc.*, 50 F.3d 615, 628 n.3 (9th Cir. 1994). Any dispute on this issue is irrelevant to CIBC, however, inasmuch as plaintiffs do not allege that CIBC participated in any way in formulating Enron's disclosures.

on which investors allegedly relied is plainly not enough to state a claim against CIBC under *Central Bank.* Instead, plaintiffs must be able to point to public statements by CIBC on which investors allegedly relied that met all of the other requirements for pleading securities fraud under the PSLRA. The only statements plaintiffs have identified in an attempt to meet this burden are statements made by analysts employed by CIBC World Markets Corp. and statements made in a May 1999 prospectus for an offering in which CIBC World Markets Corp. was an underwriter. As demonstrated below, neither category of statements is sufficient to sustain plaintiffs' claims against CIBC.

III. Plaintiffs Have Failed To State A Claim Against CIBC Based On Analysts' Reports.

A. Plaintiffs Have Failed To Meet Their Burden Of Identifying False Or Misleading Statements Made By Analysts That Were Attributable To CIBC.

Under both Rule 9(b) and the PSLRA, plaintiffs are required to identify each statement that they claim was allegedly false or misleading statement and to "specify" as to each one "the reason or reasons why" it was allegedly false or misleading when made. 15 U.S.C. § 78u-4b(1). See *Nathenson*, 267 F.3d at 412. In this case, plaintiffs quote excerpts from thirteen analysts reports issued by CIBC World Markets Corp. But, with one exception, plaintiffs do not bother to identify which of the statements they quote were allegedly false or misleading, let alone provide the required explanation as to why those statements were supposedly false or misleading. Instead, plaintiffs cite literally hundreds of statements allegedly made by a variety of different parties and then provide a laundry list of reasons why *all* of the statements were supposedly false or misleading. This kind of impermissible "puzzle-style" pleading is directly contrary to the clear requirements of the PSLRA. See *Wenger v. Lumisys, Inc.*, 2 F.Supp.2d 1231, 1243-44 (N.D. Cal. 1998) (listing cases) (a plaintiff cannot comply with the PSLRA by "merely throw[ing] the statements and the alleged 'true facts'

together in an undifferentiated clump . . . expect[ing] the reader to sort out and pair each statement with a supposedly relevant 'true fact'").

The only attempt plaintiffs make to explain why any statement in an analysts' report was allegedly false or misleading appears in ¶ 29 of the complaint, where plaintiffs allege that the analysts should have disclosed more about their firms' relationships with Enron and Enron-related entities. Plaintiffs point out that the analysts' reports typically included disclosures stating that the firm and its affiliates may from time to time perform investment banking and other services for the issuer whose performance was being profiled. Plaintiffs claim that after LJM2 was formed in late 1999, these statements should have been augmented with a disclosure of whatever interests the bank defendants or their executives had in LJM2, and that the failure to make such a disclosure rendered the conflict-of-interest warnings materially misleading.

The problem with this argument, however, is that the statement plaintiffs cite does not disclose the particulars of *any* transaction that might be deemed to give rise to a conflict of interest. Investors who read the disclosure clearly understood that they did not know the nature or extent of the firm's contacts with the issuer being profiled. Under these circumstances, the failure to disclose the specifics of one particular transaction can hardly be deemed to have rendered what the analysts did say materially misleading. See *Backman v. Polaroid Corp.*, 910 F.2d 10, 16 (1st Cir. 1990) (Rule 10b-5 does not require a speaker who comments on a particular issue to reveal all facts that investors would find interesting; instead, the speaker's only duty is to make sure that what it has said is not "so incomplete as to mislead").[7/]

[7/] This claim fails for the additional reason that plaintiffs have not met their burden of alleging facts giving rise to a strong inference that the omission was made with scienter. For all of the reasons outlined above, plaintiffs have not alleged any facts to support their claim that the limited partners in LJM2 knew that the partnership would be used for any improper transactions. Absent such knowledge, there is no basis whatsoever for plaintiffs' claim that the analysts acted with scienter in

A separate and independent basis for dismissing plaintiffs' claims against CIBC based on the analysts' report is that plaintiffs have failed to allege any facts showing why the statements should be attributed to CIBC. Under *Central Bank*, CIBC can only be liable for statements it actually made or that were publicly attributed to it. But the analysts' reports on their face state that they were issued by CIBC World Markets Corp. — and *not* by CIBC itself. See Ex. A hereto.[8/] Parent corporations are not ordinarily liable for the acts or omissions of their subsidiaries. See *United States v. Bestfoods*, 524 U.S. 51, 61 (1998). Absent specific allegations showing why this ordinary rule should be disregarded, there is simply no basis for treating statements by CIBC World Markets Corp. as if they were statements by CIBC. In the recent case of *Abbell Credit Corp. v. Bank of America Corp.*, 2002 WL 335320 at *4 (N.D. Ill. 2002), the court dismissed a Section 10(b) claim brought against Bank of America Corp. based on alleged material misstatements by an employee of its brokerage subsidiary. The court noted that although the parent company had the *power* to control its subsidiary, it had no *duty* to do so and thus could not be held liable for failing to prevent or correct the material misstatements allegedly made by a subsidiary.

So too, in this case, CIBC had no duty to control the statements made by CIBC World Markets Corp. analysts and thus cannot be held liable for failing to correct any misstatements they allegedly made. In their complaint, plaintiffs suggest that the corporate form can be ignored because CIBC is supposedly "a large integrated financial services institution" that provides a variety of services through its "controlled subsidiaries and divisions." Complt. ¶ 103. But a conclusory

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not disclosing whatever interests related parties might have had in LJM2.

8/ Each report is headlined "CIBC World Markets" and carries a legend stating that "[t]his report is issued and approved for distribution by . . . in the US, CIBC World Markets Corp., a member of the NYSE and SIPC." The legend goes on to explain that CIBC World Markets Corp. is a wholly-owned subsidiary of CIBC. See Ex. A hereto (page 2 of each report).

allegation that CIBC "controlled" its subsidiaries in some unexplained way is clearly not enough to support the wholesale disregard of CIBC World Markets Corp.'s separate corporate identity. See *Zishka v. American Pad & Paper Co.*, 2000 WL 1310529 at *4 (N.D. Tex. 2000). That is particularly true in light of the fact that plaintiffs make the identical allegation with respect to *all* of the bank defendants, see Complt. ¶¶ 100-108 — a factor that suggests a philosophical disagreement with the entire concept of corporate separateness, rather than a considered judgment based on the facts of each individual situation.

Plaintiffs also assert in their complaint that all of the bank defendants somehow caused the analysts to make positive statements about Enron in order to prop up the Company's stock price. Complt. ¶ 70. But the complaint is devoid of any factual allegations to suggest that anyone at CIBC ever provided any directions to any analyst at CIBC World Markets Corp. about what their periodic research reports should say about Enron. Accordingly, there is no factual basis for plaintiffs' claim that statements made in analysts' reports issued by CIBC World Markets Corp. should be treated as if they were statements made by CIBC.

B. Plaintiffs Have Failed To Meet Their Burden Of Pleading Scienter.

1. Because All Of The Statements Made By The Analysts Were Forward-Looking Statements, Plaintiffs Must Allege Specific Facts Giving Rise To A Strong Inference That The Analysts Actually Knew That Their Statements Were False.

Plaintiffs' allegations based on the analysts' reports should also be dismissed on the independent ground that plaintiffs have failed to meet their burden of pleading particular facts giving rise to a strong inference that the statements were made with the necessary level of scienter. The statements that plaintiffs challenge from the CIBC World Markets research reports fall into two categories. First are predictions about Enron's likely future performance, including predictions

about future earnings estimates, stock prices and business trends, and recommendations to investors based on the predictions.[9/] Second are statements repeating statistical and other information provided to the analysts by Enron.[10/]

If they are considered statements of material fact at all, the analysts' predictions and recommendations are plainly "forward-looking statements" as defined by the PSLRA.[11/] See *In re Splash Technology Holdings, Inc. Secs. Litig.*, 2000 U.S. Dist. LEXIS 15369 at * 16 (N.D. Cal. 2000) ("A forward-looking statement includes a statement containing a projection of revenues, income, or earnings per share, management's plans or objectives for future operations, and a prediction of future economic performance"); *Fellman v. Electro Optical Systems Corp.*, 2000 U.S. Dist. LEXIS 5324 at *13-19 (S.D.N.Y. 2000) (recommendations and predictions made by analysts were forward-looking statements under the PSLRA). As this Court recognized in the *BMC Software*

[9/] Each report cited in the complaint included an earnings and stock price forecast, along with a recommendation. Plaintiffs also cite numerous other types of forward-looking statements made by the analysts. See, *e.g.*, Complt. ¶ 148 ("As management continues to build on core strength in these areas we would expect the share price premium to hold"); ¶ 161 ("[E]arnings power should continue to build over the next five years"); ¶ 194 ("Year 2000 is expected to mark a major push into broadband communications services, an enterprise offering significant value creation potential . . . Accordingly, we expect ENE shares to sustain solid momentum").

[10/] See, *e.g.*, Complt. ¶ 148 ("Enron reported 1999 Q-1 income of $253 MM or $[0.34] per share . . . Improved performance was driven by continued momentum at Enron Wholesale Services"); ¶ 161 ("Enron reported 1999 Q-2 income of $222 MM or $[0.27]per share"); ¶ 176 (describing Enron Energy Services, listing customers); ¶ 183 (discussing Enron management's strategy, contracts entered into, etc.).

[11/] To the extent that the analysts' statements were merely expressions of opinion, rather than statements of fact, they are not actionable. See *In re Westcap Enterprises*, 230 F.3d 717, 728 (5th Cir. 2000). Furthermore, "projections of future performance not worded as guarantees are generally not actionable under the federal securities laws" because they are not the type of statements on which a reasonable investor would rely and hence are immaterial as a matter of law. *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1446 (5th Cir. 1993); *BMC Software Litig.*, 183 F.Supp.2d at 888 n.36. In this case, the analysts' predictions were clearly not "worded as guarantees" inasmuch as the analysts expressly disclaimed any knowledge with respect to the accuracy of the information on which their projections were based.

Litig., 183 F.Supp.2d at 917, in order to state a claim that a forward-looking statement is actionable under the PSLRA, plaintiffs must allege specific facts as "to each Defendant-speaker sufficient to give rise to a strong inference that the *speaker* knew his statement was false when it was made." (Emphasis added). Thus, as to the numerous predictions made in the analysts' reports, plaintiffs cannot state a claim unless they can allege specific facts showing that the analysts whose names appear at the top of each report actually *knew* at the time the reports were written that their predictions would not come true.

The same analysis applies to the second category of statements, in which the analysts repeated statistical and other information supplied by Enron. Under the PSLRA, the definition of "forward-looking statement" includes not only predictions themselves, but also "the assumptions underlying or relating to" those predictions. 15 U.S.C. § 78u-5(i)(1)(D). When the analysts repeated information Enron had provided to them, they did not purport to have made any independent investigation of that information, nor did they vouch for its accuracy. On the contrary, each report warned that, while the analysts had obtained the information and statistical information set forth therein "from sources which we believe to be reliable, . . . we do not represent that they are accurate or complete, and they should not be relied upon as such." See Ex. A hereto. Under these circumstances, a reasonable investor could not have viewed the analysts' reports as doing anything more than assuming the truth of the information provided by Enron and using it as a basis for making predictions. Because the Enron information the analysts repeated constituted the "assumptions relating to or underlying" the analysts' predictions, it too falls within the category of forward-looking information. Plaintiffs should not be able to state a claim based on the mere repetition of that information unless they can plead specific facts giving rise to a strong inference that the analysts *knew* that the information they were passing on was not true.

Plaintiffs have not pleaded any facts giving rise to an inference — let alone a "strong inference" — that the analysts had actual knowledge that any statements they made about Enron were false. Plaintiffs do not plead, for example, that the CIBC World Markets analysts were in possession of any material non-public information about Enron. As described above, plaintiffs claim that the analysts may have had *access* to material inside information because the Chinese walls that were supposed to preclude such access by analysts either did not exist at CIBC or were ineffective. But plaintiffs do not allege any facts to support their boilerplate allegation — made with respect to every bank defendant that was alleged to have been responsible for analysts' reports — that CIBC failed to effectively screen analysts from material inside information. Moreover, even if plaintiffs had pleaded sufficient facts to show that the analysts may have had access to material inside information, access alone is clearly not enough to give rise to a strong inference of guilty knowledge. See *BMC Software Litig.*, 183 F.Supp.2d at 885 and Part 2 below.

In order to state a claim based on the analysts' statements, plaintiffs would have to identify specific information that the analysts actually had in their possession and explain why, in light of that information, the analysts must be deemed to have *known* that the statements they made about Enron were false or misleading.[12/] Plaintiffs have not even attempted to meet that burden and thus their claims based on the analysts' statements should be dismissed.

[12/] *Compare McNamara v. Bre-X Minerals Ltd.*, 57 F.Supp.2d 396, 420 (N.D. Tex. 1999). In *McNamara*, the plaintiffs alleged that an analyst had misrepresented the existence of a gold deposit after visiting the site where the gold had supposedly been found. The court found the allegations of scienter insufficient even though the plaintiffs had alleged far more than they do here, claiming that during his visit to the site the analyst had had "access to" engineers and other experts and had seen test results that allegedly put him on notice that the gold strike was a hoax. The court held that without specific details as to what was allegedly in the test results or what the analyst allegedly saw at the site, plaintiffs had failed to meet their burden of alleging particular facts giving rise to a strong inference that the analyst had acted recklessly in making positive statements concerning the gold strike.

2. Plaintiffs Have Not Alleged Sufficient Facts To Give Rise To A Strong Inference That Anyone Who Worked For Any CIBC Entity Knew Or Was Reckless In Not Recognizing That The Statements In The Analyst Reports Were Materially False.

For all of the foregoing reasons, the Court should look only to the analysts' state of mind in determining whether plaintiffs have met their burden of pleading scienter. But even if the Court were to consider all of the allegations of scienter made in the complaint against "CIBC," plaintiffs still would not meet their burden of pleading specific facts giving rise to a "strong inference" that anyone at CIBC either knew that Enron's public statements were false or acted with severe recklessness by ignoring facts that made their falsity obvious. Plaintiffs' failure to properly plead scienter provides an independent basis, in addition to their failure to state a claim under *Central Bank*, for dismissing plaintiffs' allegations that CIBC knowingly participated in a fraudulent scheme.

As described above, plaintiffs allege, in identical terms, that all of the bank defendants knew during the purported class period that "Enron was falsifying its publicly reported financial results and that its true financial condition was much more precarious than was publicly known." Complt. ¶ 733. Plaintiffs make the rote allegation that the banks must have known about Enron's true condition because, as Enron's leading banks, they had "access to Enron's internal business and financial information" and "intimate interaction with Enron's top officials which occurred virtually on a daily basis." *Id.* It is well-settled, however, that these kinds of vague allegations of "access" to unidentified information are not sufficient to meet plaintiffs' obligation to plead scienter with particularity. As this Court held in the *BMC Software Litigation*, "conclusory allegations that Defendants' scienter was based on their executive positions" did not suffice to meet plaintiffs' burden to plead scienter under the PSLRA; instead, plaintiffs were required to allege, with particularity, what each defendant "learned, when he learned it, and how Plaintiffs know what he

learned."[13/]

Allegations that the defendant banks must have known the "truth" about Enron because they had access to material, non-public information are precisely the "type of generalized allegations routinely rejected as failing to raise a strong inference of scienter." *In re Baker Hughes Sec. Litig.*, 136 F.Supp.2d at 648 (holding that allegations that the defendant officers must have known the truth because they had "access to material, non-public information" and "received daily, weekly and monthly financial reports to apprise them of the true financial status" of the Company and were "actively involved in [its] day-to-day operations" were not enough to meet plaintiffs' burden). As the court explained in *Baker Hughes*, it is not enough to claim that the defendants had access to unspecified reports showing the company's "true" financial condition: plaintiffs must also identify the particular reports, specify their contents, and explain why the information contained in the reports made it obvious that defendants' public statements were materially false or misleading. In this case, plaintiffs have not even attempted to provide any factual basis for their claim that the banks, in their capacity as lenders, discovered information that must have alerted them to Enron's "true" financial condition. There are no allegations in the complaint to describe the information any particular bank received, let alone specific facts alleged to explain why that information supposedly alerted the banks to Enron's financial problems. Thus, these allegations must be disregarded in deciding whether plaintiffs have properly pleaded scienter.

Plaintiffs also allege that CIBC's involvement in the LJM2 partnership, the Braveheart deal, and the Hawaii 125-0 transaction demonstrates that CIBC understood that Enron was a giant Ponzi

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[13/] See 183 F.Supp.2d at 870, 885 (citing *Lirette v. Shiva Corp.*, 27 F.Supp.2d 268, 283 (D. Mass. 1998)("inferences that the defendants by virtue of their positions within the company 'must have known' about the company problems when they undertook the allegedly fraudulent actions . . . are precisely the types of inferences which this court, on numerous occasions, has determined to be inadequate to withstand the special pleading requirements in securities fraud cases").

scheme. For all of the reasons outlined above, however, plaintiffs have not alleged any facts giving rise to a strong inference that CIBC must have known that Enron was using the partnerships and SPEs it created to fabricate earnings and hide debt. For example, plaintiffs do not point to any facts suggesting that it must have been obvious to CIBC and the other LJM2 partners that the partnership would be buying assets from Enron at hugely inflated prices in order to enable Enron to report phony profits. On the contrary, the documents that investors presumably reviewed before they bought their limited partnership interests in LJM2 suggest that the investors were enthusiastic about the investment because Enron had been so successful in the past and would likely offer the partners excellent investment opportunities in the future.

Similarly, plaintiffs offer no facts to support their claim that CIBC knew that the Braveheart deal was doomed from the start. Plaintiffs do not point to any information about the project itself that was provided to CIBC, let alone explain why CIBC must have realized, when it allegedly invested $115 million in the enterprise, that there were insuperable obstacles to realizing the promised benefits of the deal. Instead, the sole basis for plaintiffs' claim that CIBC must have known the deal was designed to manufacture phony earnings for Enron is the contention that Enron secretly guaranteed CIBC's investment. Nowhere in the complaint, however, are any facts alleged to support the assertion of a secret guarantee. Plaintiffs do not allege who supposedly made the guarantee, what was said or when the assurances were allegedly provided. Instead, all that plaintiffs have to back up their claim is a newspaper article quoting unidentified Enron employees as saying that Enron had sweetened the deal by promising to repay CIBC if it did not turn out to be a money-maker as expected.

Plaintiffs admit that, after the deal was terminated three months later, Enron did not reimburse CIBC for any portion of its $115 million investment. That fact alone strongly suggests

that the alleged secret guarantee did not exist. Plaintiffs try to explain away Enron's failure to make good on its alleged promise, arguing that CIBC knew it could not ask for repayment because it was aware of Enron's fragile economic condition. But the assumptions plaintiffs make to reach that result make no economic sense: a rational bank simply would not invest $115 million in a project it knew to be a likely failure on the strength of a guarantee that it knew it could not rely upon. Where, as in this case, plaintiffs' theory "defies economic reason," it cannot serve to create the necessary strong inference of scienter. See *In re Baker Hughes Sec. Litig.*, 136 F.Supp.2d at 644.[14/]

Plaintiffs' allegations concerning CIBC's participation in the formation and financing of Hawaii 125-0 are equally lacking in the kind of specificity necessary to support an allegation of scienter. Plaintiffs claim that CIBC and the other banks received a "secret" "total return swap" guarantee that protected them from any loss on their $125 million loan to Hawaii 125-0. But plaintiffs do not cite any supporting facts to show from whom the guarantee was allegedly concealed, nor do they even try to explain how the "total return swap" supposedly made the transaction, or the way in which it was reported, improper. Plaintiffs also allege that the $125 million loan was followed by a phony hedge transaction between Hawaii 125-0 and another Enron-controlled entity called "Porcupine." Complt. ¶ 731. But the complaint is devoid of any allegations explaining what (if anything) CIBC knew about the hedge transaction, let alone facts showing that CIBC must have known that the transaction was improper or was improperly reported.

[14/] In any event, even if plaintiffs had alleged sufficient facts to give rise to a "strong inference" that Enron sweetened the Project Braveheart deal by assuring CIBC it would be paid back if the deal turned out not to be a moneymaker, that is hardly a basis for inferring that CIBC knew the project was likely to fail or that Enron was in dire financial difficulty. That Enron was willing to provide such assurances can just as easily be viewed as an endorsement of the deal — that it was so good Enron was willing to guarantee its success. In addition, if CIBC was willing to lend $115 million on the basis of Enron's assurances, it is reasonable to infer that CIBC thought that Enron was as sound financially as it represented itself to be.

Apart from the allegations described above, the only basis plaintiffs have left for claiming that CIBC and the other banks acted with scienter is their convoluted motive theory. Plaintiffs contend that all nine of Enron's banks *knew* that it was a giant Ponzi scheme, but nevertheless chose to lend billions of dollars to it and to invest in and finance various Enron-related entities, out of a desire to continue earning "huge fees" and interest payments. See Complt. ¶ 722.[15/] Even before the PSLRA was enacted, these kind of generalized allegations concerning an underwriter's or other third party's claimed desire to earn fees were deemed insufficient to meet a plaintiffs' obligation to plead fraud with particularity under Rule 9(b). See *Melder v. Morris*, 27 F.3d at 1103-04. As the Fifth Circuit recently concluded in *Nathenson*, under the PSLRA such allegations "continue to be insufficient." 267 F.3d at 412. Indeed, the Court concluded that, standing alone, even plausible allegations that the defendants had a motive to commit fraud are not enough to give rise to a strong inference that they *did* engage in fraud. *Id.*

In this case, plaintiffs' allegations of motive are implausible on their face and hence should be disregarded completely in judging the adequacy of the complaint. It simply does not make sense to presume that nine of the world's largest banks would all make the extremely risky decision to put billions of dollars at risk in the hope that they would be able to keep a massive Ponzi scheme going long enough to make the rewards worth the gamble. As the Seventh Circuit observed in *DiLeo v. Ernst & Young*, 901 F.2d 624 (7th Cir.), *cert. denied*, 498 U.S. 941 (1990), "[p]eople sometimes act irrationally, but indulging ready inferences of irrationality would too easily allow the inference that ordinary business reverses are fraud. One who believes that another has behaved irrationally must make a strong case." 901 F.2d at 629. *Accord*, *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124,

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[15/] This is yet another paragraph of the complaint that is repeated, virtually verbatim, with respect to each and every bank defendant. See Complt. ¶¶ 660, 683, 702, 744, 755, 767, 780 and 794.

1130 (2d Cir. 1994) (in judging allegations of motive, the court must assume that the defendants were acting in their own "informed economic self-interest"); *Coates v. Heartland Wireless Communications, Inc.*, 55 F.Supp.2d 628, 643 (N.D. Tex. 1999) (rejecting allegations of motive that "defie[d] common sense" and were "facially implausible").

IV. Plaintiffs Have Failed To State A Claim Under Either Section 10(b) Or Section 11 Based On The May 1999 Note Offering.

The final basis plaintiffs offer for holding CIBC liable is that "CIBC" acted as an underwriter in a May 1999 offering of certain Enron Notes. Complt. ¶¶ 723, 1006. Plaintiffs contend that CIBC is responsible under both Section 10(b) and Section 11 for all of the statements made in the Prospectus issued in connection with this offering.

Plaintiffs' Section 10(b) and Section 11 claims should be dismissed for a number of reasons. First, plaintiffs contend that CIBC is responsible for the statements in the Prospectus because it was an underwriter of the note offering. Complt. ¶ 723. But the prospectus itself, of which the Court may take judicial notice, shows that the underwriter on the May 1999 offering was CIBC World Markets Corp. — *not* CIBC. The fact that one of its subsidiaries was the underwriter cannot make CIBC itself liable for whatever was said in the Prospectus. See *Zishka v. American Pad & Paper Co.*, 2000 WL 1310529 at *4 (holding that a conclusory allegation that Bankers Trust Corporation "controlled or conspired with" its wholly-owned subsidiary, which acted as an underwriter for the offering in question, was insufficient to state a claim under Section 10(b)).

Second, although plaintiffs allege that the Prospectus contained false and misleading statements, nowhere in their complaint do plaintiffs bother to quote or identify precisely which statements made or incorporated by reference into that document are supposedly actionable. Complt. ¶¶ 723, 1007. Instead, plaintiffs use the same kind of "puzzle" pleading described above: they lump

all of the Registration Statements together and then offer a confusing array of reasons why all of them were supposedly false or misleading in a variety of ways. Complt. ¶¶ 612-641. Plaintiffs' failure to identify with specificity which statements in the only Prospectus involving CIBC were allegedly false or misleading is fatal to both their Section 10(b) and Section 11 claims. As demonstrated above, the PSLRA specifically requires plaintiffs in a Section 10(b) action to identify each allegedly false or misleading statement and "specify" as to each one "the reason or reasons why" it was allegedly false or misleading when made. 15 U.S.C. § 78u-4b(1). Although the PSLRA's pleading requirements do not apply to Section 11, plaintiffs' failure to identify the allegedly false or misleading statements violates plaintiffs' basic obligation under Rule 8 to give the defendant notice of the claims made against it, as well as its obligation under Rule 9(b) to plead fraud claims with particularity.[16/]

Finally, plaintiffs' claims under both Section 10(b) and Section 11 should be dismissed because they have failed to offer any factual support for their allegations that CIBC knew that there were false or misleading statements in the Prospectus. The only allegations in the complaint relating to CIBC's state of mind at the time of the Offering (May 1999) are the boilerplate claims that, as a lender, CIBC had access to material inside information that must have alerted it to the fact that Enron was misleading investors. For all of the reasons outlined above, these conclusory allegations fall far short of what is required to allege scienter under the PSLRA or to meet the requirements for pleading

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[16/] All of plaintiffs' claims against CIBC, including their Section 11 claim, sound in fraud. That is true despite plaintiffs' attempt in ¶ 1005 to disclaim any allegation of fraud. In that very same paragraph, plaintiffs incorporate by reference numerous allegations accusing the bank defendants of engaging in fraud, including the allegation in ¶ 103 that CIBC "engaged in participated in the scheme to defraud purchasers of Enron stock," as well as their allegation in ¶ 617 that "the banks who sold Enron's securities to the public via those Offering Documents were in a unique position to know that the statements made . . . were false and misleading." Because plaintiffs' Section 11 claims sound in fraud, Rule 9(b) applies. See *Melder v. Morris*, 27 F.3d at 1100 n.6.

fraud under Rule 9(b).

V. Plaintiffs Have Failed To Properly Plead A "Control Person" Claim Against CIBC.

In their First and Third Claims for Relief, plaintiffs allege that all of the defendants violated Sections 10(b) and 11 "and/or" are liable under Section 20(a) of the 1934 Act and Section 15 of the 1933 Act because they "controlled" a person who violated Section 10(b) or Section 11. Complt. ¶¶ 995, 1014. Plaintiffs do not bother to explain which defendants are being sued as primary violators and which are being sued under "control person" theories. To the extent that plaintiffs are alleging that CIBC is liable as a "control person," their complaint fails to state a claim because "plaintiff fails to plead any facts from which it can reasonably be inferred that the particular defendant was a control person." *Collmer v. U.S. Liquids, Inc.*, 2001 U.S. Dist. LEXIS 23518 at *10 (S.D. Tex. 2001).

CONCLUSION

For all of the foregoing reasons, plaintiffs' claims against CIBC should be dismissed.

Dated: May 8, 2002

Respectfully submitted,

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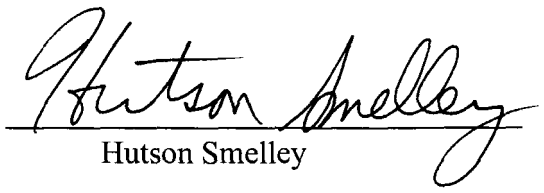
CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2002, true and correct copies of the (1) Motion of Defendant Canadian Bank of Commerce to Dismiss the Consolidated Complaint and Memorandum of Law in Support and (2) proposed order have been served upon all counsel on the attached service list in accordance with the Order Regarding Service of Papers and Notice of Hearings entered on April 10, 2002.



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EXHIBITS TO THE MOTION OF DEFENDANT CANADIAN IMPERIAL BANK OF COMMERCE TO DISMISS THE CONSOLIDATED COMPLAINT AND MEMORANDUM OF LAW IN SUPPORT

Exhibit A:

Research report dated April 13, 1999, cited in Complt. ¶ 148

Research report dated July 14, 1999, cited in Complt. ¶ 161

Research report dated October 7, 1999, cited in Complt. ¶ 176

Research report dated October 12, 1999, cited in Complt. ¶ 183

Research report dated January 6, 2000, cited in Complt. ¶ 194

Research report dated January 18, 2000, cited in Complt. ¶ 199

Research report dated January 21, 2000, cited in Complt. ¶ 207

Research report dated April 12, 2000, cited in Complt. ¶ 230

Research report dated July 24, 2000, cited in Complt. ¶ 251

Research report dated April 18, 2001, cited in Complt. ¶ 323

Research report dated July 12, 2001, cited in Complt. ¶ 334

Research report dated April 15, 2001, cited in Complt. ¶ 349

Report dated October 17, 2001, cited in Complt. ¶ 372

Exhibit B

Prospectus Supplement and Prospectus for $500,000,000 of Enron 7.375% notes due 2019 (dated May 19, 1999), cited in Complt. ¶ 723

Exhibit C

Private Placement Memorandum for LJM2 Co-Investment, L.P., cited in Complt. ¶ 646

The Exhibit(s) May

Be Viewed in the

Office of the Clerk